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RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2003 AUG 14 10:00
LAURA A. POSSESSKY^{*}
SARAH M.M. DUCKHAM^{*}
RICHARD L. THOMAS^{*}

June 26, 2003

Federal Election Commission
Office of General Counsel
999 E Street, NW
Washington, D.C. 20463

AOR 2003-24

Re: Advisory Opinion Request

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2003 JUN -1 A 10:03

Dear Sir or Madam:

This is a request for an Advisory Opinion, pursuant to 2 USC § 437f and 11 CFR § 112.1(a), on behalf of the National Center for Tobacco Free Kids ("NCTFK"). NCTFK seeks an opinion that its use of contributor information available in records of the Federal Election Commission for the purposes and in the manner described below will not violate the sale or use restrictions of 2 USC § 438(a)(4) and 11 CFR § 104.15.

Relevant Facts

NCTFK is a nonprofit corporation established in 1996 under District of Columbia law and exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code ("IRC"). NCTFK carries out public education and advocacy concerning the health effects of smoking, the efforts of the tobacco industry to market tobacco products to young people, and public policies to limit the use of tobacco products. NCTFK is funded by grants from private foundations, corporations and individuals. Under applicable IRC provisions and the organization's Articles of Incorporation, NCTFK may not participate or intervene in any political campaign on behalf of or in opposition to any candidate for public office.

NCTFK is governed by a Board of Directors made up of prominent individuals from the fields of public health. The organization does not have members as defined in 11 CFR § 114.1(e)(2).

NCTFK frequently uses direct mail communications to educate members of the public concerning the health effects of smoking, the activities of the tobacco industry, and public policy issues of importance to controlling the use of tobacco. For reasons of efficiency and effectiveness, NCTFK prefers to send such communications to individuals who are politically active, since it believes that these individuals are most likely to respond to its messages by learning more about the issues and seeking to influence their outcome. Obtaining the names and addresses of contributors to federal candidates and political committees from FEC reports is an efficient way to identify politically active individuals and, therefore, NCTFK would like to use such names and addresses of contributors solely for the purpose of communicating with them about issues of concern to the organization.

If approved by the Commission, NCTFK anticipates that each communication covered by this request will be sent to at least several thousand individuals. Each of the NCTFK communications will inform recipients about the health effects of smoking and provide information about the need for efforts to control the use of tobacco, such as higher state cigarette taxes, regulation of tobacco marketing by the Food and Drug Administration, and funding for smoking cessation and prevention programs. Examples of such communications sent by NCTFK in the past are included as Exhibits A and B. Some of NCTFK's communications will also include a call-to-action urging recipients to contact federal or state legislators and other public officials in support of specific tobacco-control initiatives. Others may reference the federal candidate to whom the recipient contributed and include a call-to-action urging recipients to contact this officeholder to express an opinion about the need to adopt effective controls on tobacco.

None of NCTFK's communications sent to individuals obtained from the FEC lists will expressly advocate the election or defeat of any candidate for federal or state office, and none of the communications will consist of electioneering communications as defined in 2 USC § 434(f)(3). Furthermore, the communications will not be coordinated with any federal candidate or officeholder within the meaning of 11 CFR §§ 109.20 and .21. The timing of the communications will be determined by NCTFK solely on the basis of legislative and other non-election related factors and without regard to the timing of any future primary or general election.

The NCTFK communications will identify NCTFK and, in some instances, one or more allied organizations, including public health groups and anti-tobacco organizations, as the sponsors of the communication. The communications sent to persons identified from FEC reports are not, however, intended to raise funds for NCTFK or any other organization, and the communications will not contain a solicitation for contributions to NCTFK or any other organization. Individuals who respond to the communications by returning a pre-addressed postcard will receive additional information about the health effects of tobacco and about tobacco control issues. The names of these individuals will also be added to a general list of persons wishing to receive similar information from NCTFK in the

future. The vast majority of individuals on these general lists will not be individuals who were first identified through the FEC reports. Future communications to this broader NCTFK list may include solicitations for contributions to NCTFK; no such solicitation, however, will be limited to or otherwise target individuals on the NCTFK lists who were first identified through the FEC reports.

The communications will also include the address of an NCTFK website such as www.tobaccofreekids.org or www.voicesagainsttobacco.org. Such websites may provide a means by which persons who choose may send messages to their elected representatives and others on various tobacco control issues. Persons who take such action will be added to a general NCTFK list of all persons who have taken action on NCTFK or NCTFK-linked websites and will receive periodic communications from NCTFK in the future regarding tobacco control issues. Some of these future communications may include solicitations for contributions to NCTFK; no such solicitation, however, will be limited to or otherwise target individuals on the NCTFK lists who were first identified through the FEC reports.

Questions Presented

1. May NCTFK use information from FEC reports to communicate with contributors to candidate and other political committees, where such communications are limited to information about issues and policies and do not contain any form of call-to-action?
2. May NCTFK use information from FEC reports to communicate with contributors to candidate and other political committees, where such communications contain both information about issues and policies and a generic call-to-action urging recipients to contact federal officeholders and other public officials concerning the subject of the communication?
3. May NCTFK use information from FEC reports to communicate with contributors to candidate and other political committees, where such communications contain both information about issues and policies and a specific call-to-action urging recipients to contact a named federal officeholder to whom they previously contributed concerning the subject of the communication?
4. May any of the communications described in questions 1-3 include a pre-addressed postcard through which recipients of the communication may indicate their interest in receiving additional information from NCTFK, which would result, as described above, in respondents being put on a broader list of people that NCTFK periodically sends various educational and advocacy communications that could sometimes include a solicitation for donations?
5. May any of the communications described in questions 1-3 direct interested persons to NCTFK websites through which they may choose to send messages to their elected representatives or others regarding various tobacco control issues?

6. If the answer to question 5 is in the affirmative, may NCTFK include the names and contact information of those who take action through an NCTFK website on a broader NCTFK list of persons who will receive future communications from NCTFK which could include a solicitation for donations to NCTFK as described above?

7. If the answers to question 4 or 6 is in the negative, may persons who return the post-cards or take action on NCTFK websites be included in a general NCTFK list of persons who may be solicited for donations by NCTFK after a reasonable period, such as one (1) year?

Legal Analysis

2 USC § 438(a)(4) provides that reports and statements filed with the Commission shall be made available "for public inspection and copying" except that "any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes."

The Commission has implemented the sale or use prohibition in a regulation which states:

Any information copied, or otherwise obtained, from any report or statement, or any copy, reproduction, or publication thereof, filed under the Act, shall not be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose....

11 CFR § 104.15(a). The regulation further states that "soliciting contributions" includes "soliciting any type of contribution or donation, such as political or charitable contributions." 11 CFR § 104.15(b).

In construing these provisions, the Commission has permitted the use of individual contributor information derived from Commission reports in circumstances not related to solicitation of contributions from such persons or commercial use of such names. For example, in Advisory Opinion 1984-2, the Commission considered the use by a candidate of reports filed by an unauthorized political committee to write letters to contributors to that committee. The Commission stated that informing such contributors that the committee is not the candidate's authorized committee and suggesting that the contributors seek refunds were not prohibited uses of contributor information. The candidate could not, however, suggest that contributions be made to his authorized committee. Similarly, in Advisory Opinion 1981-5, the Commission approved the use by a candidate of an opponent's reports of contributors to send letters to those contributors correcting allegedly defamatory statements made by the opponent during the campaign.

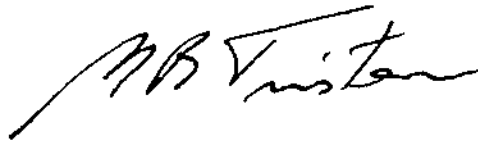
Federal Election Commission

June 26, 2003

Page 5

In this case, TFK's communications to the contributors identified from FEC records will not solicit contributions to TFK or any other entity. Furthermore, the names and addresses of contributors will not be used for any "commercial purpose" but will be restricted to charitable, educational and social welfare purposes as permitted under the Internal Revenue Code. The Commission's prior precedents make clear that the use of contributor information for political purposes does not constitute a use for commercial purposes; it follows that the use of contributor information for charitable, educational and similar purposes is not a commercial use prohibited by the statute. Accordingly, each of the questions presented should be answered in the affirmative.

Respectfully submitted,

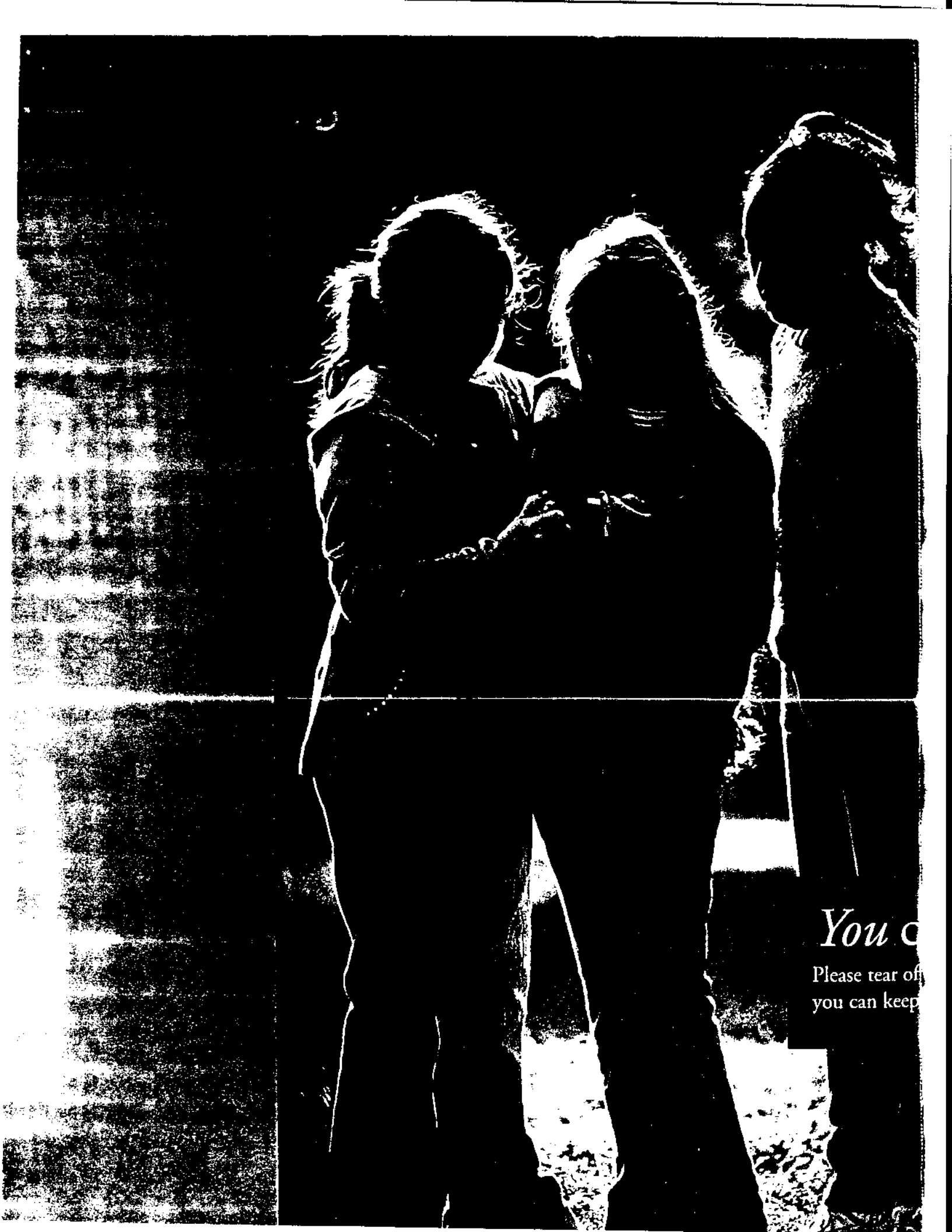
A handwritten signature in black ink, appearing to read "MB Trister", with a long, sweeping horizontal line extending from the left side of the signature.

Michael B. Trister

Enclosures

Isn't
her life
worth





You can

Please tear off
you can keep

Raising the cigarette tax will help solve our budget problems and save thousands of lives.

At a time when our state's budget deficit is at a record high, raising the cigarette tax will keep our children from falling behind. A cigarette tax could raise enough money to fund important programs from tobacco prevention to healthcare and education.

Increasing our cigarette tax is also a proven way to prevent thousands of kids from smoking and save lives. For every three kids prevented from smoking, one smoking-caused death is prevented.

(Reducing Tobacco Use: A Report of the Surgeon General, 2000; CDC, MMWR, November 1996.)

Don't you think our kids are worth it?

Can help save lives!

Fill out and send in the attached card for more information on how to raise the cigarette tax and save thousands of lives.

Please visit us on the web at:

www.SaveAmericasKids.org



NO POSTAGE
NECESSARY
IF MAILED
IN THE
UNITED STATES

BUSINESS REPLY MAIL

FIRST-CLASS MAIL PERMIT NO. 19908 WASHINGTON DC

POSTAGE WILL BE PAID BY ADDRESSEE

NATIONAL CENTER FOR TOBACCO-FREE KIDS
1400 I STREET NW SUITE 1200
WASHINGTON DC 20077-1643



67 cents thousands of children

2000 kids
1 in 3 will die prematurely from it.

☒ **YES! I want to save lives!**

I want to learn more about how I can help save lives by stopping kids from smoking before they start.

Name: _____

What is the most convenient way to reach you?

Phone: _____

E-Mail: _____

Address: _____

Your e-mail
address will
save us
additional
postage



Please fill in the attached card to
learn more about how you can keep
cigarettes away from kids and save
thousands of lives.


Please visit us on the web at
www.SaveAmericaKids.org

National Center for Tobacco-Free Kids
1400 Eye Street NW
Suite 1200
Washington, DC 20005

Non-Profit Organization
US Postage
PAID
National Center for
Tobacco-Free Kids

TFK SN1





They're
falling
behind



You can

Please tear off a
you can keep it

will
problems and save thousa

At a time when our state budget deficit is at a record high, raising the cigarette tax will keep our children from falling behind.

Increasing the cigarette tax will keep thousands of kids from ever trying cigarettes — saving thousands of lives.

Increasing the cigarette tax is a proven way to help keep our kids from smoking and raise millions for the programs they need — from tobacco prevention to healthcare and education.

(U.S. Department of Health and Human Services (HHS). Reducing Tobacco Use: A Report of the Surgeon General. 2000.)

Don't you think our kids are worth it?

an help save lives!

and send in the attached card for more information on how cigarettes away from kids and save thousands of lives.

Please visit us on the web at:

www.SaveAmericasKids.org

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and save thousands of lives.

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BUSINESS REPLY MAIL
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WASHINGTON DC 20077-1643

icasKids.org



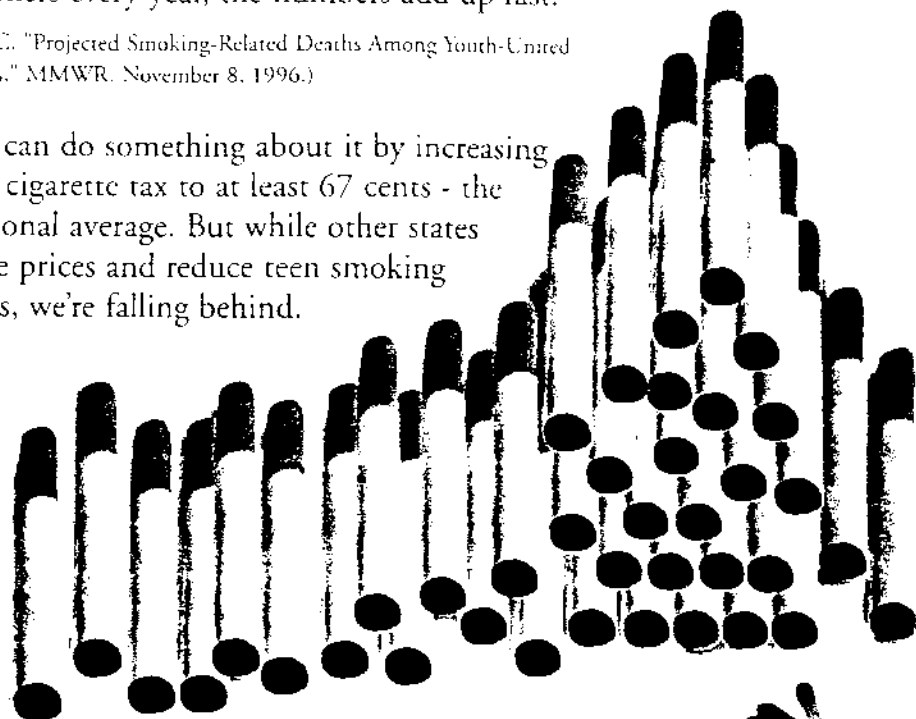
Our state has one of the lowest cigarette taxes in the country, and far too many teen smokers.

(www.tobaccofreekids.org/reports/prices; CDC, Youth Tobacco Surveillance survey and Youth Risk Behavioral Surveillance survey; State-specific tobacco use surveys.)

1 in 3 kids who get hooked on tobacco will die prematurely from it. With thousands of our kids becoming smokers every year, the numbers add up fast.

(CDC, "Projected Smoking-Related Deaths Among Youth-United States," MMWR, November 8, 1996.)

We can do something about it by increasing our cigarette tax to at least 67 cents - the national average. But while other states raise prices and reduce teen smoking rates, we're falling behind.



✓ YES! I want to save lives!

I want to learn more about how I can help save lives by stopping kids from smoking before they start.

Name: _____

What is the most convenient way to reach you?

Phone: _____

E-Mail: _____

Address: _____

Your e-mail
address will
save us
additional
postage



STOP THE SMOKING.

Please fill in the attached card to learn more about how you can keep cigarettes away from kids and save thousands of lives.

Please visit us on the web at
www.SaveAmericasKids.org.

National Center for Tobacco-free Kids
1400 Eye Street NW
Suite 1200
Washington, DC 20005

11K-02

Non-Profit Organization
US Postage
PAID
National Center for
Tobacco Free Kids





FEDERAL ELECTION COMMISSION

Washington, DC 20463

July 10, 2003

Michael B. Trister, Esq.
Lichtman, Trister & Ross
1666 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20009

Dear Mr. Trister:

This refers to your letter dated June 26, 2003, on behalf of the National Center for Tobacco Free Kids ("NCTFK"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to NCTFK's proposed use of contributor names obtained from political committee disclosure reports filed with the Commission.

You state that NCTFK is an incorporated 501(c)(3) organization that engages in public education and advocacy concerning the effects of smoking and public policy concerning the use of tobacco products, through the use of direct mail communications. It is funded by grants from private foundations, corporations, and individuals. You assert that it does not participate or intervene in any political campaign on behalf of, or in opposition to, any political candidate.

NCTFK prefers to send its direct mail communications to individuals who are politically active, since they are the most likely to respond to the messages by learning more about the issues and seeking to influence their outcome. You state that NCTFK would like to obtain the names of such individuals by using the contributor names in political committee reports filed with the Commission. You state that the communications sent to these individuals are not intended to raise funds from them, and will not contain a solicitation. Individuals will be able to respond to the communications by returning a pre-addressed postcard, and then they will receive additional information about tobacco issues. The names of those responding will be added to a general list of persons wishing to receive similar information in the future. The vast majority of the persons on "these general lists" will be those first identified through Commission reports. Future communications to individuals on these lists, however, will solicit donations to NCTFK.

You ask a series of questions about whether NCTFK may make communications to the individuals whose names were obtained from the list. These questions include variations as to the actions requested in the communications and whether the individuals will be solicited in the future.

The Act authorizes the Commission to issue an advisory opinion request in response to a "complete written request" from any person about a specific transaction or activity by the requesting person. 2 U.S.C. §437f(a). Such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 CFR 112.1(c). The Office of General Counsel shall determine if a request is incomplete or otherwise not qualified as an advisory opinion request. See 11 CFR 112.1(d).

In view of the above requirements, this Office will need further detail as to the proposed use of names from reports filed with the Commission. Specifically:

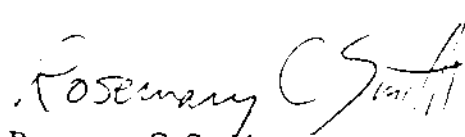
- (1) Please state whether the names obtained from political committee reports filed with the Commission will be included in lists that NCTFK (or any "allied" organizations), at some future point, will rent or sell to other organizations, businesses, or individuals, or on lists that will be exchanged with other organizations, businesses, or individuals. If so, briefly describe the nature of these transactions, including the specific types of entities renting or exchanging the lists and the frequency with which NCTFK (and its allied organizations) will engage in such transactions.
- (2) Please state whether NCTFK (or any allied organizations) will, at any future point, attempt to sell literature or other items to the individuals or entities whose names are obtained from the reports filed with the Commission. If so, briefly describe the nature of these transactions, including what would be offered and the frequency with which NCTFK (and its allied organizations) will engage in such transactions.
- (3) If NCTFK (or any allied organizations) will not add the above-described names to lists used for rental, sales, or exchange, or for the receipt of sales offers, will such names be used to otherwise update such lists (e.g., for deleting names or updating addresses)?

For your information and guidance, we enclose Advisory Opinions 1995-5 and 1985-16. Upon receipt of your responses, this Office will give further consideration to your inquiry. If you have any questions about the advisory opinion process, the enclosed

Letter to Michael B. Trister
Page 3

opinions, or this letter, please contact Jonathan Levin, a senior attorney in this Office, at 202-694-1542.

Sincerely,

A handwritten signature in dark ink, appearing to read "Rosemary C. Smith". The signature is fluid and cursive, with the first name "Rosemary" being more legible than the last name "Smith".

Rosemary C. Smith
Acting Associate General Counsel

Enclosure

Advisory Opinions 1995-5 and 1985-16

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JOSEPH J. KRANYAK^a

^aALSO ADMITTED IN MD
^aADMITTED IN TX ONLY

August 5, 2003

Ms. Rosemary C. Smith
Acting Associate General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2003 AUG 11 A 10:10

Re: National Center for Tobacco Free Kids

Dear Ms. Smith:

I am writing in response to your letter dated July 10, 2003 regarding the Advisory Opinion Request submitted on behalf of the above-referenced organization.

At the outset, there is a significant error in your description of the activities proposed to be undertaken by NCTFK. The next to last sentence on page 1 of your letter states: "The vast majority of the persons on 'these general lists' will be those first identified through Commission reports." This is incorrect. As set forth on page 3 of the AOR, the persons responding to the direct mail communications whose names are obtained from FEC records will constitute only a very small proportion of the individuals on the general list maintained by the organization: "The vast majority of individuals on these general lists will not be individuals who were first identified through the FEC reports." (Emphasis added.) The general list referred to in the AOR currently includes more than 250,000 names, none of whom were initially identified from FEC records. Based on typical response rates to direct mail communications, NCTFK does not expect to add more than 1000 names to this list through its mailings to individuals identified from FEC reports, and this number could turn out to be far smaller.

With respect to the specific questions raised in your letter, the organization's responses are as follows:

1. NCTFK does not currently sell, lease or exchange names from its general list to or with other organizations, businesses, or individuals. If this practice should change in the future, the organization will ensure that no names initially obtained from FEC records will be sold, leased or exchanged unless the name has also been added to the list independently of the direct mail communications to donors in the FEC lists.

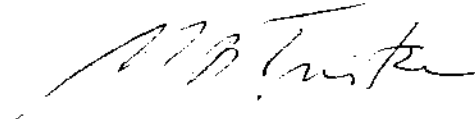
Ms. Rosemary C. Smith
August 5, 2003
Page 2

To date, NCTFK has not transferred its general list, or any part of it, to any third parties. While NCTFK is planning to allow certain allied organizations to send messages to subsets of NCTFK's general list in furtherance of NCTFK's charitable and educational purposes, all such communications will be done subject to NCTFK's review and approval; no fee (or exchange) will be charged for such use; the allied organizations will not be permitted to sell, lease or exchange names from the NCTFK list; and the allied organizations will not be allowed to use any communications to the NCTFK list to sell literature or other items or for any fundraising or membership solicitation purposes.

2. Neither NCTFK nor any allied organization will sell literature or other items to the individuals or entities whose names are obtained from the reports filed with the FEC.
3. Neither NCTFK nor any allied organization will use names obtained from reports filed with the FEC to update or enhance lists used for rental, sales, or exchanges, or for the receipt of sales offers.

We look forward to the Commission's prompt attention to our request.

Sincerely,

A handwritten signature in dark ink, appearing to read "M. B. Trister", with a long, sweeping horizontal line extending to the left.

Michael B. Trister